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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 ANTHEM, INC.,

4 Plaintiff,

5 v.

16 CV 2048 (ER)

6 EXPRESS SCRIPTS, INC.,

7 Defendant.

8 -----x

9 New York, N.Y.
June 3, 2016
10:33 a.m.

10 Before:

11 HON. EDGARDO RAMOS

12 District Judge

13 APPEARANCES

14 WHITE & CASE LLP

15 Attorneys for Plaintiff

16 BY: GLENN KURTZ

CLAUDINE COLUMBRES

17 QUINN EMANUEL

Attorneys for Defendant

18 BY: MICHAEL B. CARLINSKY

MICHAEL J. LYLE

19 ANDREW S. CORKHILL

20 JACOB J. WALDMAN

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(In open court; case called)

MR. KURTZ: Good morning. Glenn Kurtz of White & Case on behalf of the plaintiff.

If I may, I'm joined here today by my partner Claudine Columbres and a summer clerk Ivan Navedo.

MR. CARLINSKY: Good morning. Michael Carlinsky from Quinn Emanuel for Express Scripts. I'm joined by my partner Mike Lyle, and Andrew Corkhill, and our associate Jake Waldman. And in the courtroom also is Mr. Christopher Kelly of the Holland & Knight firm. We also have some summer interns in the back. They didn't wear ties so I made them sit as far away from the court as possible.

THE COURT: That was a good move.

Good morning to you all. I believe this is the first time the parties have appeared before me, correct?

MR. KURTZ: That is correct, your Honor.

THE COURT: So Mr. Kurtz or Ms. Columbres, let me begin with you. Why don't you give me, in a nutshell, if you can about what this case is. You can remain seated. Just speak directly into the microphone.

MR. KURTZ: Thank you, your Honor.

It is the first time we're here so let me maybe just give a little bit of background on the case and the parties. Anthem is one of the country's largest health benefit providers. It serves, through its affiliated health plans,

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1 about 38 million lives, a little more than 38 million lives in
2 this country.

3 And as a health benefit provider Anthem contracted
4 with the defendant in this case, Express Scripts, often called
5 ESI, to be the exclusive provider of pharmacy benefit services,
6 which is typically called in the industry a PBM and the way
7 I'll refer to it today.

8 A PBM actually contracts for and sells the drugs to
9 the end-user. So it's a key player in the goal of providing
10 affordable medicines to citizens.

11 Anthem's contract with ESI is for ten years and it
12 sets out the initial pricing. Given the volatility of drug
13 pricing, however, and the length of the agreement, there's also
14 a periodic repricing provision which is commonplace in all of
15 these types of contracts. And specifically it's section 5.6 of
16 the agreement. And it provides for Anthem to hire a health
17 expert consultant to analyze the marketplace and to determine
18 whether or not Anthem is continuing to receive a competitive
19 benchmark price, and the precise language is, quote, to ensure,
20 really WellPoint but now Anthem, is receiving competitive
21 benchmark pricing.

22 THE COURT: Define that for me.

23 MR. KURTZ: That is pricing that is competitive in the
24 marketplace. That's market pricing. Competitive benchmark
25 pricing. Whatever benchmark is in the marketplace.

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1 The procedure is after determining what the market is
2 for competitive benchmark pricing is Anthem then proposes those
3 terms and ESI is obligated in good faith to negotiate to
4 achieve them.

5 And, as expected, drug prices have changed pretty
6 substantially. And, in fact, at this point Express Scripts is
7 overcharging Anthem and its members an aggregate more than 14
8 billion dollars through the remaining life of the agreement and
9 then through the posttermination transition period to a new
10 PBM.

11 THE COURT: I'm sorry. 14 million or 14 billion?

12 MR. KURTZ: Billion. Over 14 billion. That's through
13 2019 and then through some period of 2020, as the program would
14 be transitioned to somebody providing competitive benchmark
15 pricing. ESI has utterly refused to negotiate at all in good
16 faith or otherwise for competitive benchmark pricing. In fact,
17 it's repudiated its obligation outright. And ESI hasn't
18 reduced pricing by a dime.

19 THE COURT: So it's repudiated its obligation by
20 refusing to engage in this --

21 MR. KURTZ: By saying it's not obligated to provide
22 competitive benchmark pricing and by refusing to provide
23 anything even remotely close to competitive benchmark pricing.

24 THE COURT: How is that repricing provision
25 mechanically to work? Did Anthem on its own determine the

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1 expert to come up with these benchmarks or was it an individual
2 or group or entity that the parties jointly identified?

3 MR. KURTZ: No. The contract provides for Anthem to
4 either do it itself or hire a market consultant. Anthem hired
5 an entity called Health Strategies. They are the leading PBM
6 benefit consultants in the marketplace. They have access to
7 effectively every PBM agreement in the marketplace. And they
8 perform, they model and look through databases, and they
9 performed the analysis and determined what competitive
10 benchmark pricing was, which was then later confirmed by other
11 evidence including a market offer by another PBM entity.

12 THE COURT: Pursuant to the agreement between the
13 parties, ESI was required to accept whatever determination that
14 individual came up.

15 MR. KURTZ: ESI was required to negotiate in good
16 faith to achieve the objective which was stated as insuring,
17 not talking about, but insuring that Anthem receives
18 competitive benchmark pricing.

19 THE COURT: Okay.

20 MR. KURTZ: So it went through that process it. It
21 went nowhere. As I mentioned, ESI hasn't reduced pricing by a
22 dime even though I think it regrettably acknowledged, it has to
23 acknowledge how pricing has moved.

24 We've been asking for the better part of a year, maybe
25 a little more than a year, what ESI's pricing is to other

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1 customers that will demonstrate their view of competitive
2 benchmark price. And they have declined to offer us any
3 information. But we think that their pitches to customers in
4 their recent contracts is also going to demonstrate that
5 they're overstated by more than \$14 billion through the period
6 that I indicated.

7 So we brought the lawsuit. We bought two basic
8 buckets of claims. The first relates to the pricing breaches
9 which I've just addressed. The other relates to a series of
10 operational breaches, reporting and administrative type
11 matters. That's not relevant for today's purposes but it's
12 important.

13 There are breaches that expose Anthem to enforcement
14 actions by CMS and have resulted in certain members not getting
15 approved for drugs they needed and also resulted in approval
16 for drugs that shouldn't have been approved for use.

17 THE COURT: These are CMS enforcement actions against
18 ESI?

19 MR. KURTZ: They would be against -- yes.

20 THE COURT: What was their obligation under the
21 agreement concerning those enforcements?

22 MR. KURTZ: It's to comply with law in an expert
23 fashion. And I don't think there's really a lot of dispute.
24 What happened basically is Express Scripts migrated over to a
25 new system without any adequate testing and there was all kinds

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1 of problems. They acknowledged throughout the period the
2 problems they had. They'll argue they're not material enough
3 to justify a termination. That will be a question for the
4 court. But they've been asking for calculations on damages.

5 THE COURT: Asking who for calculations on damages?

6 MR. KURTZ: Anthem for a calculation on damages, which
7 is a pretty rigorous exercise given that the number of
8 transaction that are impacted and how they've -- and there's
9 some contingency left including whether or not there will be
10 enforcement actions and the like.

11 It's a bunch of highly technical reporting and
12 approval and notice type breaches that are pretty well
13 documented and amount to -- at this point I think the count is
14 about \$150 million but that's not even close to having
15 completed all the problems. So that's where we are standing
16 today.

17 THE COURT: The change that ESI implemented concerned
18 their computer systems?

19 MR. KURTZ: Yes. Primarily we think the results were
20 a bad migration to a computer system that hadn't been properly
21 tested.

22 They also have an awful lot of turnover and a lack of
23 expertise in certain areas based on turnover. Apparently it's
24 not always the most pleasant place to work. So we've had some
25 issues relating to human resources as well.

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1 But we think the problems were primarily derived from
2 a bad migration of a computer system prematurely and without
3 adequate testing.

4 THE COURT: Let me turn to Mr. Carlinsky. Just your
5 view of this case.

6 MR. CARLINSKY: I'll be very brief, your Honor. Thank
7 you.

8 In 2009 Express Scripts, and then it was called
9 something else, but Anthem, the plaintiff in this case, entered
10 into an negotiation. At the time Anthem wanted to sell. It
11 had its own PBM, pharmaceutical benefit manager, in house. It
12 was a failing PBM. And at the time it wanted to sell that PBM.
13 There was a negotiation pursuant to which we would acquire
14 Anthem's failing PBM and we would enter into the agreement
15 which is before the court today, the PBM agreement to provide
16 these services for a ten-year period of time.

17 As part of the negotiation Anthem was offered two
18 options. Behind door number one in essence, your Honor, was a
19 much smaller upfront payment. So, ESI would buy this failing
20 PBM for a much smaller upfront amount but in return the pricing
21 that Anthem would receive over the duration of the agreement
22 would be lower; or alternatively, as we like to refer to it
23 behind door number two, was: Anthem you can choose to take a
24 much, much higher upfront payment which exposes us, Express
25 Scripts, to much great risk over the duration because we're

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1 paying -- there's much greater upfront amount, but in return
2 the pricing over the duration of the contract will be higher.
3 And Anthem chose in essence door number two. It took the deal
4 to accept upfront \$4.675 billion as opposed to, I think, door
5 number one was roughly 500 million, just so the court can
6 appreciate the difference.

7 As a result of that deal, which was Anthem's choice,
8 there was an agreement. It has in a schedule A which has
9 specific pricing terms, and they are higher pricing terms than
10 what would have been had they chosen the other option.

11 What's important here is the language of 5.6 that
12 Mr. Kurtz is referring to, which is really the centerpiece of
13 this dispute, is not what is typically found in these types of
14 agreements. So it's not what's called a market check standard
15 type of industry provision. Rather, this was a bespoke
16 provision, bespoke because it recognized what had been the deal
17 at inception, the larger upfront payment.

18 And what's most important, your Honor, because
19 Mr. Kurtz didn't actually read to the court the language of
20 this paragraph. Fortunately it's -- I think it's four
21 sentences.

22 So the first sentence is: Anthem or a consultant will
23 conduct a market analysis every three years to ensure that
24 Anthem is receiving competitive benchmark pricing.

25 That's an undefined term. Your Honor asked the

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1 question. It's an undefined term.

2 But more importantly, here's what it says about what
3 Express Scripts' obligations, if any, are. "In the event
4 Anthem determines that such pricing terms are not competitive,
5 Anthem shall have the ability to propose renegotiated pricing
6 terms to Express Scripts." So "ability to propose."

7 And then what is Express Scripts' obligation?

8 "Express Scripts agrees to negotiate in good faith
9 over the proposed new pricing terms."

10 And then most importantly is the last sentence which
11 makes clear, "Other than a good faith negotiation obligation,"
12 that's the extent of our obligation. Because it provides,
13 "Notwithstanding the foregoing, to be effective any new pricing
14 terms must be agreed by Express Scripts in writing."

15 That was a bespoke provision, again, to recognize that
16 there was a lot of money paid upfront and as a result the
17 pricing set forth in Exhibit A will be higher for the duration
18 of the contract. You, Anthem, have a right to seek a
19 negotiation and we have an obligation to negotiate in good
20 faith.

21 But as the law, we think, is clear, beyond the
22 obligation to negotiate in good faith we don't have to agree to
23 their terms. And in this case not only did Anthem come forward
24 with proposing pricing terms that we think were just not made
25 in good faith.

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1 As Mr. Kurtz has said, they've demanded \$14 billion.
2 Now, our client and Anthem have engaged in a year's worth of
3 negotiations. Anthem's position is you either agree to this
4 amount or, I'm sorry, you're in breach. And our position is,
5 No, that's not our obligation.

6 Now we have offered concessions throughout this period
7 that amount to three plus billion dollars in savings to Anthem.
8 What's interesting is Anthem's own CEO and CFO multiple times
9 throughout the course of 2015 publicly, in analyst conferences,
10 in shareholder releases, have stated that they believe they are
11 entitled to five hundred to seven hundred million -- this is
12 public statements -- five hundred to seven hundred million
13 dollars a year in concessions which, by the way, would actually
14 be less than the amounts that we have already offered as part
15 of our good faith negotiations.

16 Now we get a complaint that literally came -- was
17 filed in March that asserts \$14 billion that it claims it's
18 entitled to in order to achieve competitive benchmark pricing.
19 And, of course, our obligation is we've negotiated in good
20 faith. We believe we've satisfied our obligation.

21 So that's our view of the case, your Honor. I can get
22 into the operational breaches. I think, frankly, they were put
23 in there -- they're essentially the tail wagging the dog here.
24 I think they were asserted as leverage because what Anthem is
25 saying is these operational breaches -- by the way, all of

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1 which, I believe or -- there may be one or two issues that
2 still are being remediated. But my understanding is all of
3 those issues have long been resolved. Yet, they brought these
4 operational breach claims because they contend if they can
5 prove a breach, it gives them the right to terminate the
6 agreement even though the agreement is to continue until 2019.
7 So we view it as sort of a leverage type claim.

8 THE COURT: Let me ask you this.

9 How long has the agreement been in place?

10 MR. CARLINSKY: Since 2009.

11 THE COURT: And over the life of the agreement has
12 there been any agreement to move the rate one way or the other?

13 MR. CARLINSKY: Great question, your Honor.

14 In 2012 because, as the language says every three
15 years there is this ability to do a price review, in 2012 a
16 different management team, and that becomes important here, a
17 different management team at Anthem invoked that process. The
18 parties went through the process as I've described it, which
19 was it was a good faith negotiation; not hey, here is our bill
20 you need to agree to this. And the parties reached an
21 agreement.

22 And at the time, by the way, your Honor, various
23 officers of the company, of Anthem -- and I think in 2014, in a
24 reflection back, the general counsel of Anthem recognized that
25 the language of 5.6 doesn't impose an obligation on Express

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1 Scripts. It gives Express Scripts discretion whether to accept
2 new terms. It has to go through a good faith negotiation. And
3 in 2012 that's exactly what the parties did.

4 We now have a new management team that feigns that
5 they have amnesia as to what happened back in 2009 and what
6 happened in 2012.

7 THE COURT: Thank you. Let's talk about the proposed
8 motion.

9 Mr. Kurtz.

10 MR. KURTZ: Sure.

11 I mean, your Honor, would it help if I took a minute
12 to correct some of that because it's not right.

13 THE COURT: In a minute.

14 MR. KURTZ: For the proposed motion, your Honor
15 we're -- there are two counterclaims at issue here: One for
16 unjust enrichment and one for implied covenant of good faith
17 and fair dealing.

18 We think the motion will be straightforward and quite
19 simple. There are two claims that are covered by the expressed
20 subject matter of the contract. All parties agree to that.

21 ESI suggests that it's pleading in the alternative,
22 and you can do that, you can plead an alternative claim where
23 there's a claim that would fall outside the scope of an
24 agreement. But there is no claim like that here. There is no
25 alternative claim.

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1 Both parties agree that the subject matter is
2 addressed by the agreement, and they have to because the
3 repricing obligation is a contractual obligation. It's not an
4 obligation that stands outside of the contract.

5 So, Anthem's position is that the dispute is covered
6 by the contract and that the contract requires ESI to provide
7 competitive benchmark pricing regardless of the fact that ESI
8 paid a purchase price to buy a subsidiary of Anthem back in
9 2009.

10 And ESI's position is that the contract covers the
11 subject matter of the claims and that it does not require that
12 they pay competitive benchmark pricing by reason of the
13 purchase price that they paid in 2009 for the PBM NextRx.

14 So, there is no scenario under which you could recover
15 outside the contract. The contract governs. Either you win
16 under the contract or you lose under the contract.

17 So, for instance, take the implied covenant claim.
18 The allegation by ESI is that Anthem breached section 5.6 by
19 not negotiating in good faith and primarily by failing to take
20 into account the purchase price paid for NextRx. And then the
21 implied covenant claim is that Anthem breached the implied
22 covenant of good faith and fair dealing by, again, purportedly
23 not negotiating in good faith under section 5.6. They are the
24 identical claims. They seek the identical damages. There's a
25 long line of uniform cases that says you can't do that.

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1 There's a recent case by the Commercial Part in New York
2 Supreme. It's *DOLP 1133 Properties v. Amazon*. It was decided
3 in August of 2015. It looked at exactly the same circumstances
4 in that we have an expressed provision, it actually uses the
5 language "good faith." So we have a textual identity here as
6 well. And said you can't pursue an implied covenant case based
7 on a lack of good faith because that's a contract obligation.
8 It's the same exact claims.

9 The unjust enrichment even goes further because the
10 unjust enrichment claim is actually premised on a governing
11 contract. The unjust enrichment claim is that if ESI loses on
12 its interpretation of the agreement, meaning that ESI is
13 required to provide competitive benchmark pricing regardless of
14 the purchase price for RX, then Anthem will be unjustly
15 enriched. Once you have a governing contract, you can't
16 contradict it through an unjust enrichment claim as a matter of
17 law.

18 I think your Honor's recent decision in *Worldwide*
19 *Services Limited v. Bombardier Aerospace Corporation* is
20 instructive. There your Honor granted a motion to dismiss
21 because the contract claim depended on, and therefore was
22 duplicative, of a breach of contract claim. And here, too,
23 obviously the unjust enrichment claim depends on the contract.

24 In short, if ESI is correct about the contract, then
25 it prevails under the contract. If ESI is incorrect about the

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1 contract, then it loses under the contract.

2 But under no scenario can it go outside the contract
3 and bring some sort of quasi contract claim. Either the
4 contract gives us competitive benchmark pricing, and it does,
5 in which case you can't have a quasi contract claim undermining
6 that, contradicting it; or the contract, as they read it,
7 allows you to not provide competitive benchmark pricing, in
8 which case they went out of the contract.

9 THE COURT: Thank you.

10 Mr. Carlinsky.

11 MR. CARLINSKY: Thank you, your Honor.

12 First, just on a practical level. We as the
13 defendant -- as a defendant we could have been defending --
14 what a typical defendant does, file a motion to dismiss, delay
15 the case from moving forward. We answered the complaint so
16 that we can get this case moving forward. And we filed
17 counterclaims. Mr. Kurtz now seeks to move to dismiss or
18 permission to file a motion with respect to two of the
19 counterclaims.

20 Now, on the most practical level, your Honor, your
21 Honor's decision disposes of this motion. Your Honor in the
22 *Growblox* case from last year held very specifically in this
23 exact context. Quote, "At the pleading stage a party is not
24 required to guess whether it will be successful on its
25 contract, tort or quasi contract claims." Your Honor cited to

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1 Rule 8 of the federal rules which, frankly, governs the issue.
2 And your Honor went on to hold that: A party at the pleading
3 stage could plead both a breach of express contract claim as
4 well as unjust enrichment and quantum meruit claims in the
5 alternative, recognizing that Rule 8 allows alternative
6 pleading. And Rule 8 even goes so far to say even if haven't
7 specifically denominated a claim as one in the alternative it
8 is to be read as such. Now in this case we clearly denominated
9 our unjust enrichment claim as one in the alternative. And
10 under Rule 8 I think the implied covenant claim can be read
11 both as pled in the alternative, but it also has been pled as a
12 separate standalone claim.

13 So, from your Honor's prior holdings and under Rule 8
14 we think it disposes of the issue, and at the pleading stage
15 these claims should be permitted to go forward.

16 THE COURT: Let me ask Mr. Kurtz. At an even more
17 practical level, would discovery at all be affected by getting
18 rid of these two claims?

19 MR. KURTZ: It would, your Honor. And let me -- let
20 me answer that first, which is that the idea of litigating the
21 entirety of a 2009 4.675 billion dollar M&A transaction extends
22 and expands discovery far beyond what would be appropriate in
23 this case. So there could be a pretty substantial change in
24 how discovery proceeds in the event that those allegations are
25 eliminated at the outset. And I think we'd in the first

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1 instance object and then try to negotiate some proper limited
2 scope of discovery to the extent there's anything relating to
3 the 2009 transaction that has anything to do with the fully
4 integrated document that we're suing on here today.

5 As a related point, ESI accuses us in the papers of a
6 strategic ploy here today of trying to delay discovery. That's
7 a little bit ironic. One, what ESI doesn't mention is that two
8 days before submitting their preconference opposition letter to
9 your Honor they served requests for production for 246
10 different categories of documents. They've had no problem
11 whatsoever preparing their discovery requests. They have
12 alleged and requested documents relating to all the subjects
13 relating to the merger in 2009 and elsewhere.

14 And in terms of how fast they want to move, that's a
15 little ironic because they were actually looking to extend
16 discovery and delay it. And the only reason we have the
17 schedule we have is based on our insistence.

18 So the way ESI wanted to proceed was that documents
19 would begin to be produced no later than September of 2016 and
20 they wanted to prevent even an exchange of a request for
21 production of documents. We told them we'd give them about a
22 week to catch up to us but we were getting our document
23 requests out and we exchanged mutually a couple days -- on the
24 25th, a couple days before they submitted their letter.

25 ESI suggested a schedule where discovery where

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1 continue until June 29, 2018. We thought that was way too long
2 and although we tried to get a more aggressive schedule, we
3 ultimately made some accommodations and some compromises to get
4 us to where we are now which I think is September 2017, about
5 nine months earlier.

6 THE COURT: I guess neither party proposes that
7 discovery stop.

8 MR. KURTZ: Not even close. We've insisted that it go
9 forward. And we've prompted them to give us the document
10 requests. And as I said it was served 246, two days before
11 writing your Honor saying they were not in a position to
12 propound discovery without having an answer. So that's just
13 not right.

14 And then the next issue I'd raise, your Honor, on
15 this. I think all of this works better on a full record. But
16 this is a 4.675, rounded up to 4.7 billion dollar counterclaim
17 against a public company. It's totally legally deficient. We
18 don't think a public company -- and this gets media attention,
19 this case, it will get media attention -- should have to defend
20 against a legally deficient claim until you get to summary
21 judgment when ESI will doubtlessly say let it go to trial at
22 the next pre-motion conference. It's disruptive of the way the
23 parties have to deal with each other going forward. We won't
24 credit in any way, shape or form that there is any way to go
25 forward on this. It doesn't even make sense.

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1 I mean their claim, by the way, is if they have to
2 provide competitive benchmark pricing in accordance with the
3 terms of the contract then they've been damaged doesn't make
4 any sense. And their notion that they're damaged because the
5 negotiation didn't result in their giving us price
6 concessions -- they're right now \$14 billion ahead of the
7 game -- doesn't make sense either. But what it does do is it
8 makes it more difficult to get a consensual resolution as they
9 are holding over us a pretty -- in any other case, a pretty
10 sizeable counterclaim, \$4.7 billion.

11 So we think it's a pretty straightforward motion.
12 Especially on a full record. We don't see any conceivable way
13 you could go forward -- your Honor, *Growblox* your Honor went
14 out of his way to point out the differences in legal theories
15 and claims that supported the unjust enrichment in that case.
16 And they weren't duplicative, in any way, of contract.

17 In this case there is just -- there is no way to
18 proceed on a quasi -- the only reason that we have a pricing
19 case is under the contract. Either we're right and they owe
20 competitive benchmark pricing and there is no way they can
21 undermine that through an implied claim or an unjust enrichment
22 claim, or they're right -- and they're not -- that they don't
23 have to provide a competitive benchmark in which case they too
24 are relying on the terms of the contract.

25 I don't see this as a difficult issue but it has a

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1 pretty significant impact on how the parties deal with each
2 other going forward.

3 THE COURT: Mr. Carlinsky, I will give you a minute to
4 respond.

5 MR. CARLINSKY: Thank you, your Honor. Let me answer
6 your Honor's question because I'm not sure it was answered.

7 Will discovery be any different with or without these
8 claims? The answer I think is clearly no. It will be the same
9 scope of discovery.

10 I understand why Mr. Kurtz would prefer to keep the
11 4.675 out of the case, because it's not helpful. But it is the
12 most central fact of the case. And discovery will not change
13 regardless.

14 Our suggestion is the most efficient way to handle
15 this is -- I heard him mention on a full record. If this claim
16 is defective, let's deal with it at summary judgment. Don't
17 deprive a party of the ability to plead as the rules and as
18 your Honor has held in the alternative, first of all.

19 By the way, I have their document requests and their
20 document requests, meaning Anthem's, to be clear asks for
21 documents regarding the purchase of the Anthem PBM for 4.675.

22 So the scope of discovery is going to be the same.
23 There is nothing to be gained or saved by dealing with these
24 two out of six or seven counterclaims at a motion to dismiss
25 stage and we submit it would be wrong.

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1 But I also understand that they have essentially a
2 God-given right to file a motion to dismiss. If they're going
3 to file the motion, discovery obviously will go forward. We
4 would ask that at a minimum they be required to answer the
5 counterclaims irrespective of the fact that they may be
6 permitted by the court or by the federal rules to move with
7 respect to those two counterclaims.

8 And if there's anything else I'm happy to answer the
9 court.

10 THE COURT: No. I think I have my arms around the
11 basic issues although I understand there's a lot of complexity
12 to these agreements. And you're right, Mr. Carlinsky, they
13 have virtually a God-given right to make the motion. So I'm
14 going to let them make the motion.

15 Mr. Kurtz, how much time do you want?

16 MR. KURTZ: We'd like to file -- I don't have a
17 calendar in front of me. June 24 is a weekday?

18 THE DEPUTY CLERK: It's a Friday.

19 MR. KURTZ: We would file on the 24th.

20 THE COURT: Mr. Carlinsky, to respond.

21 MR. CARLINSKY: 30 days please, your Honor.

22 THE COURT: 30 days. And two weeks to reply.

23 MR. KURTZ: Thank you, your Honor. And we'll get
24 those dates in a second.

25 THE DEPUTY CLERK: The motion is due June 24, 2016.

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1 The response is due July 25, 2016. And the reply is due
2 August 5, 2016.

3 MR. CARLINSKY: Thank you.

4 THE COURT: Okay. Is there anything else?

5 MR. CARLINSKY: Your Honor, may I raise one issue?

6 THE COURT: Sure.

7 MR. CARLINSKY: My partner just reminded me.

8 In the event that Mr. Kurtz is going to move to
9 dismiss, which obviously is clear now, could we have an
10 opportunity to let Mr. Kurtz know within, and the court, within
11 five days whether we seek to amend any of our counterclaims.
12 Because, obviously, if we're going to amend, then I would
13 rather have Mr. Kurtz, and I'm sure the court would prefer that
14 the motion be directed at an amended counterclaim. We've
15 thought about it in light of the premotion letters.

16 Could I ask that the schedule be adjusted by a week or
17 that we be given five days to file an amended counterclaim?

18 THE COURT: That makes sense to me, Mr. Kurtz.

19 MR. KURTZ: Yes. I have no objection at all as long
20 as we have an opportunity to review it.

21 THE COURT: Absolutely.

22 MR. KURTZ: Because now we're sort of working on the
23 existing counterclaim. So maybe we would take 30 at that
24 point -- if they're not going to change, I think the three
25 weeks you provided for would be adequate; if they are going to

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1 redo their counterclaims, maybe we'd ask for 30 days.

2 THE COURT: So why don't you -- why don't we do this.
3 Why don't Mr. Carlinsky and Mr. Kurtz you two talk. Let me
4 know what you decide and submit a proposed motion schedule.
5 Okay.

6 MR. KURTZ: Thank you.

7 THE COURT: So why don't you do that by next Friday.

8 MR. CARLINSKY: Yes, your Honor.

9 THE COURT: Yes.

10 MR. CARLINSKY: Then on the last question with regard
11 to the answer. I don't know what Mr. Kurtz -- I haven't had a
12 chance to ask Mr. Kurtz what his intention was in that regard
13 so perhaps I should confer with him first.

14 THE COURT: Okay. Very well.

15 Let me know that as well by next week.

16 MR. CARLINSKY: Thank you.

17 THE COURT: Okay. Unless there's anything else we're
18 adjourned.

19 (Adjourned)